

An Advanced Course in Court Packing: Hungary's New Law on Administrative Courts

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December 2018 was a noisy month in Hungarian politics. Opposition MPs tried to affect the fate of several bills in the parliamentary debate and then by obstruction. The best known bill – nicknamed the [slave law](#) – aims [to make manufacturing in Hungary even more attractive for foreign direct investment](#) by raising the number of overtime hours employers could request to 400 p.a. (from 250) while delaying payment for the extra time for up to 3 years. Once rules of order were used to silence the opposition in Parliament, massive street protests amplified discontent over the bill.

Street protests of the scale and persistence are unusual in Hungary. In 2014 [demonstrations against the planned internet tax](#) made the Orbán government retreat, but the protests of 2017-18 against the ousting of Central European University made no impression. The demonstrations against the slave law did not affect its passing in Parliament and signing by President Áder. Opposition MPs could not even get across [to have their 5 points read on public television](#): first they were [removed by building security by force](#) and days later were finally told by an editor that programming was a matter of editorial discretion in public broadcasting. The most visible difference was in the [style of policing the demonstrations](#): the display of force by the sheer number of police deployed as well as the techniques used to monitor and control protesters were unusual.

The protests did not disrupt government operations. [Prime Minister Orbán received the US ambassador at a soccer game](#) outside Budapest. This was an important milestone for [the new US ambassador who could not get across to Prime Minister Orbán](#) before concerning the fate of Central European University, a US-accredited institution. With public attention focused on the slave law in the press and on the streets, Parliament passed several bills of lasting constitutional significance, including a comprehensive amendment to the 2011 law on churches and [a new law establishing administrative courts](#).

The new law (Act no. CXXX of 2018) brings into existence a self-standing branch of administrative courts, nominally within the Hungarian judiciary, yet, placed under the direction of a separate, newly established Supreme Administrative Court (*Közigazgatási Felsőbíróság*) alongside the existing Supreme Court (*Kúria*). The new law puts into play the Seventh Amendment of the Fundamental Law passed in June 2018, shortly after Hungarian voters returned Prime Minister Orbán's FIDESz party for a third consecutive term with 2/3 majority.

The design and establishment of the new Hungarian administrative judiciary provides insight into a new style of engineering illiberal constitutional democracy *through* dialogue with European constitutional actors. It is not simply the case that Hungary is undertaking judicial reform while the Article 7 TEU process is on its way. Rather, a new phase of judicial reform is passed under European supervision despite the clear threat it presents for the rule of law. It is too early to tell whether European constitutional actors will take the bait, yet – if a recent decision of the European Court of Human Rights is a sign to go by – the Orbán government may well succeed in undermining the rule of law with the kind assistance of European constitutional actors.

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Hungary's administrative judiciary was abolished in 1949 with the Communist takeover. Transition to democracy in 1989 and subsequent judicial reforms did not restore administrative courts for pragmatic reasons (such as lack of resources and qualified personnel). In 2011 when FIDESz embarked on its constitutional overhaul, they focused on taking over the Constitutional Court and the existing judiciary, with compromising judicial self-government, renaming the Supreme Court and forcing judges into early retirement. The overhaul of the Hungarian ordinary judiciary did not happen to the same degree as in Poland. The Venice Commission, the European Commission, and the two European courts successfully intervened with shaping the powers of the National Council of the Judiciary and also with the reshuffling of personnel via early retirement. By 2018 it became part of the playbook to request the opinion of the Venice Commission on judicial reform, except that the law was passed before the Venice Commission could have a say on the bill.

The idea of establishing a separate wing of administrative courts was first floated in 2016 as part of the reform of public administration. At the time FIDESz did not have 2/3 majority in Parliament. When the government tried to establish administrative courts via a simple statute, the Constitutional Court however invalidated the statute: the Court agreed with President Áder that such a change would have required a constitutional amendment (1/2017 (I. 17 AB decision)).

According to the official reasons supporting the bill on administrative courts, this is a measure to give effect to the judgment of the Constitutional Court and to enforce the Seventh Amendment of the Fundamental Law. It is also a measure to restore a feature of Hungary's historic constitution and to align the Hungarian constitutional regime with its European counterparts. According to the Hungarian government, the model chosen was inspired by solutions in Austria and Bavaria where administrative courts are placed under the direction of the ministry of justice, too.

A careful reading of the law confirms that the noble pretext essentially enables the packing of the Hungarian judiciary to the degree that the 2011 constitutional overhaul could not achieve. The supreme court (*Kúria*) is sidelined through receiving a peer, the Supreme Administrative Court. The ranks of administrative courts will be filled in part from volunteers from the currently existing administrative and labor division of the judiciary, and in part by new appointments. Transfers of judges serving in administrative and labor divisions will not be automatic, but have to be requested:

the first instance level of the new administrative judiciary is organized on the regional level, while the existing courts sit one level below, on the county level. This means that judges requesting transfers potentially face a major disruption of their private and family lives.

New appointments to the administrative bench can be selected from the ranks of the judiciary as well as from various paths of the civil service. Although the selection process includes a competition managed by the judiciary, the final decision is taken by the Minister of Justice. The Minister may alter the ranking of candidates. Still, the minister's power over the staffing of the new courts is moderate compared to his powers over finances and case management.

The jurisdiction of this new wing of the judiciary, staffed by former civil servants handpicked by the Minister of Justice will have jurisdiction over a wide range of cases, including – most likely – election disputes. A separate bill passed in December 2018 (Act no. CXXXI of 2018) made meticulous transitional arrangements for the new administrative courts to open on January 1, 2020.

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The ministerial supervision of the new administrative courts is not a hidden quality of the new regime, it is a stated feature of the institutional design chosen after careful comparative analysis. That judicial careers can be upset on such short notice is certainly bad news for fans of the rule of law. It is all the more surprising that the European Court of Human Rights saw no problem with an early retirement scheme introduced by the Hungarian government for the judiciary and the prosecution in 2013. In December 2018, in [*J.B. and others v. Hungary*](#) the ECtHR found the complaints of such judges and prosecutors inadmissible, because the applicants failed to establish with proper precision the severity of the impact this legislative measure had on their private life protected under Article 8. The test used by the ECtHR to establish the impact of an interference with one's professional life as an aspect of private life was established in September 2018 in [*Denisov v. Ukraine*](#).

It is striking that in *J.B. and others* the ECtHR was looking to ascertain the individualized impact of a large-scale judicial reform on the professional lives of judges forced into early retirement by law [§ 132]. In doing so the ECtHR did not address the applicants' contention that legal rules prescribing their early retirement constituted "a serious attack against the independence of the Hungarian judiciary as a whole." [§. 113] Instead, the Court repeated several times that the current regulation of judicial and prosecutorial retirement was shaped in the course of a dialogue with the Constitutional Court, the Venice Commission, the CJEU and the European Commission. The act of parliament passed in 2013 as a result of this dialogue has provisions on compensation as well as transitional provision, adhering to requirements of legal certainty. This approach is a clear departure from the deeply contextualized approach followed by the ECtHR a few years earlier, [when it assessed the firing of Chief Justice Baka through constitutional and legal reform](#).

The freshly passed Hungarian law on administrative courts signals to Hungarian judges that they are disposable and interchangeable with civil servants. The ones

who get to stay do so at the grace of the political discretion of parliament (always on the path to improve the functioning of the judiciary through reforms) and – in the case of the new administrative courts – the Minister of Justice. Bad as this sounds, to the extent the reform is carried out in dialogue with European constitutional actors, it appears to be shielded from criticism by a strong presumption of compatibility with the rule of law and human rights. This is cause for concern at a time when potential challengers of the judicial reform (the parliamentary opposition, judges, human rights defenders and scholars among them) face existential threats, executed through legal rule passed by Parliament and dutifully printed in the Hungarian Official Journal.

